

***United States Court of Appeals
for the Second Circuit***

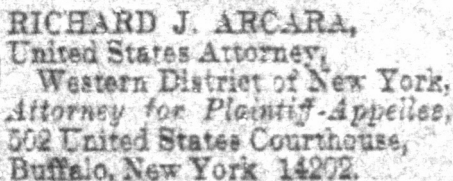


**BRIEF FOR
APPELLEE**

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First Assistant United States Attorney,
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IN THE
United States Court of Appeals
For The Second Circuit

No. 76-1361

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALFRED C. MATHIAS,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of New York

BRIEF OF PLAINTIFF-APPELLEE

Statement of Issues Presented for Review

1. The Court below erred and abused its discretion in not dismissing the indictment for want of a speedy trial as repeatedly requested in pre-trial motions and letters by the defendant attorney.
2. Should a motion for a mistrial been granted by the Court for the apparent unfair conduct of the prosecuting at-

torney for failure to disclose to the defendant, a statement given by a prime witness for the prosecution whose story was diametrically changed from one formerly given to the F.B.I. and the defense in their respective investigations?

3. That the conviction of the defendant, Alfred C. Mathias should be reversed in view of the improper remarks made by the Assistant United States Attorney during his summation.

Statement of Facts

This appeal arises from the conviction after jury trial of defendant ALFRED C. MATHIAS for unlawfully conspiring to defraud the United States of America of federal funds made available by the Department of Housing & Urban Development for the operation of the Model Cities Agency's Mayor's 1973 Summer Youth Program under a grant pursuant to Title I of the Demonstration Cities and Metropolitan Development Act of 1966 (P.L. 89-754) as amended (T. 42, U.S.C., §§3301-3374) and also, from the conviction for unlawfully concealing material facts as to the fact that certain paychecks were being made payable to individuals who never worked.

Named in the indictment as a co-conspirator with ALFRED C. MATHIAS was Joseph Lott. Count I charged conspiracy to defraud the United States in violation of T. 18, U.S.C., §371 and Counts II through V charged defendant MATHIAS with the substantive violation of T. 18, U.S.C., §1001. Defendant's conviction was on Counts I, II, and V. No verdict was reached as to Counts III and IV.

The Honorable John T. Curtin, Chief Judge for the Western District of New York, presided over the jury trial. Magistrate Edmund F. Maxwell from the date of the filing of the instant

indictment on August 28, 1974 presided over pre-trial discovery proceedings. Within three months after the indictment, the Government filed its Notice of Readiness for trial on November 22, 1974. Thereafter, on May 27, 1975 co-conspirator Joseph Lott pleaded guilty to conspiracy and the defense moved on Sixth Amendment grounds for an order of dismissal as to ALFRED C. MATHIAS for want of speedy trial. Nine days later the Government's response to the defendant's motion to dismiss was filed and on June 16, 1975 Judge Curtin denied defendant's motion. A pre-trial conference followed on August 6, 1975 and this case was held ready for trial. In a letter filed with the court on November 3, 1975, the defense requested an immediate trial and once again on May 11, 1976 the Government moved the case ready for trial whereupon a jury was impaneled.

Following four days of testimony, the jury returned its guilty verdict against defendant MATHIAS on Counts I, II and V of the indictment on May 20, 1976. After the polling of the jury, sentencing was deferred until June 28, 1976 whereupon imposition of sentence was suspended and the defendant was placed on probation for a period of three years and fined \$500, the sentence on each count to run concurrently. It is from the judgment and sentence that ALFRED C. MATHIAS appeals.

We now turn to a review of the evidence produced at trial which led to the conviction of the defendant and details the following scenario. The Mayor's 1973 Summer Youth Program was a satellite project of the City of Buffalo Model Cities Agency which was 100% federally funded to the extent of \$520,000 and its purpose was to provide job training opportunities for inner-city underprivileged youths (Tr. 37-39). The program had its main administrative office at 535 Michigan Avenue, Buffalo, New York where its six primary

administrative officers were assigned, including Assistant Bookkeeper, ALFRED C. MATHIAS (Tr. 41-42).

As Assistant Bookkeeper, defendant MATHIAS had payroll responsibilities which included the recording of hours worked by youths onto payroll runs (Tr. 84-87) and the picking up, sorting, and distribution of paychecks to the Program's employees. He also had access to all administrative office records including paychecks which were left over after the various paydays (Tr. 94-96). Co-conspirator Joseph Lott likewise was assigned to the 585 Michigan Avenue office (Tr. 8). His capacity was that of Intake Center Officer at that location and his responsibilities included the hiring of youths, the certifying of their hours worked and the assisting in paycheck distributions (Tr. 82, 94, 128).

Sometime in August of 1973, while at the 585 Michigan Avenue office Joseph Lott had a conversation with the defendant about the taking of certain paychecks which remained unclaimed (Tr. 135). In approximately early September, Joseph Lott was given a paycheck made payable to David Tillman (Govt. Ex. 13) by the defendant (Tr. 137). That check was already endorsed in the name of David Tillman and both the defendant and Joseph Lott were aware that David Tillman had not worked for the Program (Tr. 136). Thereafter, Joseph Lott deposited the check to his bank account at the Niagara Permanent Savings & Loan Association of Buffalo and split the proceeds of that check with defendant ALFRED C. MATHIAS (Tr. 138).

David Tillman, a Naval Officer, stated that although he knew the defendant from high school, he never worked for the Mayor's 1973 Summer Youth Program, had never received any Program paychecks, and never authorized the defendant to receive or endorse checks in his name (Tr. 225). He further testified that a first endorsement on the Government Exhibit 13 check in the name of David Tillman was not his signature.

Similarly, Government witnesses Clayton Silver and Jerome James testified that they never worked for the Mayor's 1973 Summer Youth Program and never received any paychecks from the Program (Tr. 225, 242). Program paychecks (Govt. Ex. 16, 17, 18) made payable to them also bore first endorsements which were not theirs and had the second endorsements in the name of Alfred C. Mathias (Tr. 237, 238, 241, 245). Two of them (Govt. Ex. 17, 18) had written on them savings account number 90-241289 belonging to the defendant (Tr. 217).

The remaining payee who testified was Marcella King. She told the jury that the defendant asked her if she wanted to make a little extra money without having to do anything (Tr. 191) and that during that summer of 1973, she actually was employed at the Chevrolet plant in Buffalo, New York (Tr. 188). Of the five paychecks made payable to her (Govt. Ex. 11), she split the proceeds of three of them with the defendant (Tr. 196, 197). She further testified that the defendant told her that if confronted by the F.B.I. or his own attorney "don't admit to anything, because I hadn't done anything and that if I had to say anything, that I worked at School 47 playground in the daytime before 3:30 and my boss was Kenny Johnson." (Tr. 205).

In his own defense, ALFRED C. MATHIAS took the witness stand and testified. Essentially, he stated that he paid David Tillman several times by giving Joseph Lott moneys out of his own pocket to pay him (Tr. 371); that he gave money to Joseph Lott to pay Jerome James and Clayton Silver and received their paychecks in return (Tr. 374-378); and that the Marcella King check bearing his own second endorsement was given to him by Joseph Lott already endorsed with the name Marcella King (Tr. 380, 381). On cross examination it was pointed out that, in all pertinent respects, his prior

statements given to the F.B.I. and his sworn testimony before the federal grand jury were consistent with each other and with his direct testimony at trial. See e.g. (Tr. 411-412; 416-422; 469-474; 423-436; 443-445).

Approximately eleven months after the calling of the aforementioned checks and after intensive investigation by the F.B.I., the grand jury after its investigation, returned the indictment against ALFRED C. MATHIAS on which this case stands.

ARGUMENT

POINT I

The defendant was not denied his Sixth Amendment right to a speedy trial and the District Court's decision so holding was proper.

Defendant ALFRED C. MATHIAS argues that the District Court abused its discretion in not dismissing the indictment upon which he was convicted after jury trial for want of a speedy trial. His motion to dismiss exclusively alleges the constitutional claim of Sixth Amendment deprivation. The denial of that motion by Judge Curtin was clearly supported by the record and thus, should not be disturbed here. *United States v. Brownstein*, 521 F.2d 459, 463 (2d Cir. 1975), *cert. denied*, U.S. (1976); *United States v. Boston*, 508 F.2d 1171, 1179 (2d Cir. 1974); *cert. denied*, 421 U.S. 1001 (1975).

In support of his argument to this Court, the defendant claims that his demands for speedy trial were made "frequently and continually from the beginning of the case." (D.Br. 8). The record does not support this statement.

A review of the docket sheets is revealing. On August 28, 1974 the present indictment was returned and by September 24, 1974 pre-trial discovery was completed. Promptly, the Government filed its Notice of Readiness on November 22, 1974. The four scheduled status report dates which followed were continued by the District Court without objection by the defendant. Although on May 27, 1975 a motion to dismiss on Sixth Amendment grounds was filed, there is no evidence that the defendant previously had affirmatively demanded an early trial. Nine days later the Government responded. Denial of the defendant's motion took place on June 16, 1975 and Chief Judge John T. Curtin in his order commented that after examining the docket and the record in the instant case "... it is clear that any delay occasioned was to prepare the case for trial. The Court can find no delay caused by the government which required dismissal ...". Thereafter, the instant case was held ready for trial on August 6, 1975. On November 3, 1975 a defense letter for immediate trial was filed with the court and on May 11, 1976 the Government again moved for trial whereupon a jury was impaneled.

Bearing in mind the four-factor balancing test enunciated in the case of *Barker v. Wingo*, 407 U.S. 514, 530-33 (1971), the alleged delay here is minimal and certainly not extraordinary. See e.g., *United States v. Infanti*, 474 F.2d 522 (2d Cir. 1973) (28 months); *United States v. Fasanaro*, 471 F.2d 717 (2d Cir. 1973) (Over 4 years). Nor can it be said in the instant case that the time from indictment to trial was intentionally caused by the Government as in *United States v. Roberts*, 515 F.2d 642 (2d Cir. 1975) or attributable to anything other than calendar congestion which is neutral reason for delay. *Barker v. Wingo*, *supra* at 531.

Furthermore, the defendant has failed to meet his burden of establishing substantial prejudice. *United States v. Marion*,

404 U.S. 307 (1971). In fact, the aforementioned filing of the Government's Notice of Readiness after only 86 days is not even "presumptively prejudicial" (*Barker v. Wingo, supra* at 330) and is an adequate measure to insure defendant's constitutional right to a speedy trial. *United States v. Pierro*, 498 F.2d 386, 389 (2d Cir. 1973). Moreover, the defendant makes no assertion as to unavailability of witnesses and it cannot be claimed that the defendant's ability to prepare a defense was impaired because, at all times, he remained at liberty on his own recognizance.

There is, however, an attempt to establish prejudice. His position is twofold. First, he seeks to attribute to the alleged delay the fact that the testimony of Government witness Marcella King at trial was incriminatory as to him and contrary to her prior statements to the F.B.I. and defense counsel. Certainly, this can only be described as "grasping for straws" and a wholly unconvincing argument. His other claim of prejudice is that he "... was unable to obtain employment and was barely able to sustain himself with loans from friends and relatives." (D.Br. 8). Once again, this claim is not supported by the record in that the defendant himself testified at trial that six months after the return of the indictment he was attending college classes pursuing a Masters Degree and, from October 1975, was employed through the Community Action Organization at School 47 in the Human Service Center as Program Coordinator and Fiscal Officer (Tr. 351). This latter claim, in any event, would be attributable to the fact of indictment itself rather than to any delay. See *United States ex rel. Tobia L. Spina v. McQuillan, Warden*, 525 F.2d 813, 818 (2d Cir. 1975).

POINT II

The District Court did not err in denying defendant's motion for a mistrial.

Citing no authority, the defendant intimates that a mistrial should have been declared by the trial judge when requested to do so on the ground that he allegedly "did not have all of the 3500 material" relating to the substance of the testimony of Government witness Marcella King (D. Br. 10).

At the trial, Marcella King testified that the defendant asked her if she wanted to make a little extra money without having to do anything; that he gave her three Model Cities Agency paychecks and a Mayor's Model Cities 1973 Summer Program identification card; that she split the proceeds with him; that another check (Govt. Ex. 20) made payable to her and second endorsed Alfred Mathias was never received or signed by her; and that he told her not to admit anything and to tell the F.B.I. and his own lawyer that she worked at School 47 playground and that her boss was Kenny Johnson (Tr. 188-199; 204-207). It is because this testimony was not consistent with the F.B.I. report provided defense counsel as Jencks Act material nor with her statement taken by the defense attorney at his office and because Marcella King orally told the Government about it before trial, that the defendant now complains.

The defendant apparently believes that a mistrial should have been declared because somehow the circumstances surrounding Marcella King's testimony violates the Jencks Act (Tr. 220). It is clear, however, that the trial court's denial of the motion for mistrial should be sustained unless clearly erroneous. *Cf. Matthews v. United States*, 407 F.2d 1371, 1376 (5th Cir.) 1969, cert. denied, 398 U.S. 968 (1969).

Clearly, the burden of proof as to whether or not particular materials are statements and are subject to production pursuant to the Jencks Act is upon the defendant. *United States v. Pennett*, 496 F.2d 293, 298 (10th Cir. 1974), citing, *United States v. Snaldone*, 484 F.2d 311 (10th Cir.), cert. denied, 415 U.S. 915 (1973). A plain reading of the Jencks Act (Title 18, U.S.C., § 3500) and current case law requires the Government to turn over statements in its possession written by a witness or, if orally made, as recorded by agents of the Government upon timely demand and if related to the direct testimony of the witness. *Palermo v. United States*, 360 U.S. 343, 345-346 (1958). In the instant case, the only recorded statement of witness Marcella King in the Government's possession was turned over to defense counsel before trial and hence, there can be no violation of the Jencks Act requirements and no impairment to cross-examination. Furthermore, since Marcella King's oral statement was not exculpatory of the defendant, he cannot now be heard to complain. See e.g., *Moore v. Illinois*, 408 U.S. 786 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963). See also e.g., *United States v. Register*, 496 F.2d 1072, 1080-1081 (5th Cir.), cert. denied, 419 U.S. 1120, rehearing denied, (9/4/74).

POINT III

The Government's summation was proper.

Defense counsel claims that the following remarks made by the Government attorney in his summation to the jury were improper:

Thank you, Judge, and that is the case and I am just submitting this to you in the form of argument and for your consideration in light of your every day experiences in life. Look at the leaning of the lettering of Alfred C.

Mathias for a right-hand person. It leans left. Take a look at the name "David" on the check that is named in the conspiracy. The lettering leans left. Take a look at, when you deliberate, if you so choose, the letters "A", "I" and "D" in the name "David" and compare them against the "A", "I" and the "D's" in all of the Alfred C. Mathias endorsements. And I submit to you that you will find that they will appear to be precisely the same in formation and slant and I submit to you consider in light of Joe Lott's testimony to you that the name David Tillman appeared on the check when he was given that check by Alfred C. Mathias (Tr. 510, 511).

Clearly, it is a well-established principle in this Circuit that both defense counsel and counsel for the Government are permitted to argue within broad limits, the inferences they wish the jury to draw from the evidence. See e.g., *United States v. Gerry*, 515 F.2d 130, 144 (2d Cir. 1975); *United States v. White*, 486 F.2d 204, 207 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974); *United States v. Lacey*, 459 F.2d 86, 91 (2d Cir. 1972); *United States v. Colasurdo*, 453 F.2d 585, 595 (2d Cir. 1971); *cert. denied*, 406 U.S. 917 (1972); *United States v. Dibrizzi*, 393 F.2d 642, 646 (2d Cir. 1968). In this regard, the evidence adduced at trial showed that the defendant gave the referred-to check of David Tillman (Govt. Ex. 13) to co-conspirator Joseph Lott; that the endorsement David Tillman was on the back of the check when it was received from the defendant; that defendant MATHIAS in his capacity as book-keeper was responsible for the issuance of and had access to Program pay checks; that defendant MATHIAS knew David Tillman and was aware that he did not work for the Mayor's 1973 Summer Youth Program; that the second endorsement Alfred C. Mathias together with account number 90-241289 on the back of the other referred-to David Tillman check (Govt. Ex. 14) were those of the defendant; that David Tillman did not endorse either check; and that the proceeds of

the cashing of the David Tillman check (Govt. Ex. 13) were split between the defendant and Joseph Lott. It is evident, therefore, that the complained of comments were based upon evidence and could not be construed by the jury as coming from the prosecutor's personal knowledge. See *United States v. Hysohion*, 439 F.2d 274, 277-278 (2d Cir. 1971); *United States v. Grunberger*, 431 F.2d 1062, 1068 (2d Cir. 1970).

It also is appropriate to point out that as a general evidentiary principle, a jury is competent to compare unidentified writing with writing already in evidence or with specimens admitted as genuine for comparison purposes. *Weinstein on Evidence*, § 901. In addition, it is proper when showing to a jury exhibits previously admitted into evidence to comment on them, point out features for emphasis, draw deductions and inferences from them and fairly argue from them. 6 *American Jurisprudence Trial*, § 36. c.f. *United States v. Ortega*, 471 F.2d 1350 (2d Cir. 1972).

Assuming *arguendo* that the complained of summation comments were not related to the proof, whether or not they deny the defendant due process depends on whether the comments were slight, rather than persistent and pronounced such as to have a proper cumulative effect on the jury which could not be disregarded as inconsequential. *Berger v. United States*, 295 U.S. 78 (1935). Here, in light of the entire record, the summation comments were inconsequential and furthermore, the following two admonitions to the jury by Judge Curtin are sufficiently curative so as to have avoided any possibility of prejudice:

... We had no expert testimony about this, ladies and gentlemen, and it is pure argument on the part of, and we have no evidence about this. I will permit Mr. Skretny to make the argument but you keep it in mind that as far as whether this is left leaning or right leaning or up and

down there was no testimony about the other signature (Tr. 510).

I think though, ladies and gentlemen, that I wanted to hear Mr. Skretny's statement. I think it just would be best if you did not consider that at all in your consideration here because I am going to tell you in my charge you cannot speculate, guess or surmise. Ladies and gentlemen, and Mr. Skretny, handwriting even to a handwriting expert, it is a very difficult science. We know that members in our own family sign their name one way one day and maybe they are not feeling well and they sign it another way another day or they are hurried or it is late and they are tired, late in the evening. I think we all know our own signature varies from time to time. I just think that it would be best, Mr. Skretny, if we do not press this argument about the signatures. I think we ought to talk about what the witness testified about and what the exhibits—how they inter-relate with the testimony of the witnesses (Tr. 511, 512).

See *United States v. Briggs*, 457 F.2d 908 (2d Cir. 1972).

In addition, since defense counsel neither objected to the charges nor requested any other instructions, he should not now be heard to complain. *United States v. Nasta*, 398 F.2d 283, 285 (2d Cir. 1968).

Finally, the Government attorney during summation on at least four occasions (Tr. 494, 495, 502) reminded the jury that it is their recollection of the facts that controls and not the recollection of the Government attorney or defense counsel.

Conclusion

For the reasons set forth, the Government requests that the conviction of defendant ALFRED C. MATHIAS be affirmed.

Dated: Buffalo, New York, October 5, 1976.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

Re: United States of America
vs
Alfred C. Mathias

No. 76-1361

I, LaVerne C. Cooley, Jr. being
duly sworn, say: I am over eighteen years of age
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at the First Class Post Office in Batavia, New
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Richard J. Arcara, U.S. Attorney. Att: William M. Skretny
First Asst. U.S. Attorney
502 U.S. Courthouse, Buffalo, New York 14202

LaVerne C. Cooley, Jr.

Sworn to before me this

15th day of October, 19 76

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1977